No. 02-1183

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

SAMUEL FRANCIS PATANE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF AUTHORITIES

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1. Respondent's opposition to certiorari does not address the critical reason why this Court should grant the petition: the courts of appeals are divided on whether a failure to give the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966), mandates suppression not only of the defendant's unwarned statement, but also of any physical evidence derived from that unwarned statement.

As the petition explains (at 10-12), the court of appeals' holding here—that suppression of physical derivative evidence is required—conflicts with decisions of the Third and Fourth Circuits, which have held, after *Dickerson* v. *United States*, 530 U.S. 428 (2000), that a failure to give *Miranda* warnings never

requires the suppression of physical evidence derived from a defendant's unwarned but voluntary statement. See *United States* v. *DeSumma*, 272 F.3d 176, 180 (3d Cir. 2001) ("[T]he fruit of the poisonous tree doctrine does not apply to derivative evidence secured as a result of a voluntary statement obtained before *Miranda* warnings are issued."), cert. denied, 535 U.S. 1028 (2002); *United States* v. *Sterling*, 283 F.3d 216, 218-219 (4th Cir.) (reaffirming pre-*Dickerson* holding that "derivative evidence obtained as a result of an unwarned statement that was voluntary under the Fifth Amendment is never 'fruit of the poisonous tree'"), cert. denied, 536 U.S. 931 (2002). The Tenth Circuit's decision also conflicts with the First Circuit's post-*Dickerson* decision in *United States* v. *Faulkingham*, 295 F.3d 85 (2002), petition for cert. pending, No. 02-7385 (filed Oct. 7, 2002), in which the court used a case-by-case approach that requires the suppression of derivative physical evidence only when the need for deterrence outweighs the reliability of the evidence in the particular case, and that concluded that suppression was improper where the officers, in the heat of a fast-moving drug arrest, had simply neglected to give *Miranda* warnings to an arrestee who volunteered information. That conflict warrants this Court's resolution.

2. Respondent presents four arguments for denying review. Respondent contends that (1) *Dickerson* and *Wong Sun* v. *United States*, 371 U.S. 471 (1963), require suppression of the fruits of a constitutional violation (Br. in Opp. 9-10); (2) *Michigan* v. *Tucker*, 417 U.S. 433 (1974), and *Oregon* v. *Elstad*, 470 U.S. 298 (1985), do not resolve the question presented in this case (Br. in Opp. 10-13); (3) there is no showing that the question presented in this case arises frequently (Br. in Opp. 13-14);

and (4) this case is not a suitable vehicle for deciding whether *Miranda* requires suppression of physical evidence derived from an unwarned, but *voluntary* statement, because there was no determination by the trial court that respondent's statement was voluntary (Br. in Opp. 14-15). None of those contentions has merit.

a. The petition discusses (at 5-8) the relevant holdings of this Court that support the conclusion that suppression is not warranted when physical evidence is acquired as the fruit of a failure to give *Miranda* warnings. As noted above, three circuits have concluded that *Dickerson* did not cast doubt on that analysis. Whatever the merits of respondent's and the Tenth Circuit's contrary view, this Court alone can resolve the disagreement in the courts of appeals over the meaning of those precedents.

b. The petition also discusses this Court's decisions in *Tucker* and *Elstad*, explaining how the principles of those decisions establish that the fruits of an unwarned statement are admissible as long as the unwarned statement was voluntary. That *Tucker* and *Elstad* rested on additional points of analysis and can be distinguished factually (Br. in Opp. 10-13) does not undermine their relevance to the issue in this case. Cf. *Elstad*, 470 U.S. at 308 (relying on *Tucker*'s "reasoning" in concluding that the "absence of any coercion or improper tactics undercut[] the twin rationales—trustworthiness and deterrence"—for suppression of derivative evidence).

c. Respondent does not make any effort to show that the issue in this case lacks sufficient recurring importance to warrant this Court's review. In fact, it arises with regularity. That is not because officers are unfamiliar with *Miranda* (cf. Br. in Opp. 13-14 n.2), but because the taking of unwarned statements will inevitably

occur in the course of routine police work. As this Court recognized in *Elstad*, *Miranda* applies only when an individual is in "custody," but "the task of defining 'custody' is a slippery one, and 'policemen investigating serious crimes [cannot realistically be expected to] make no errors whatsoever." 470 U.S. at 309 (quoting *Tucker*, 417 U.S. at 446). This case as well—in which respondent himself interrupted the officers during the reading of the *Miranda* warnings to advise them that "he knew his rights" (Pet. App. 4a)—provides an additional example of how officers acting in complete good faith can elicit unwarned statements that lead to derivative evidence.

The reported cases, both before and after *Dickerson*, reveal that officers commonly acquire derivative evidence as the result of unwarned statements. *United States* v. *Elie*, 111 F.3d 1135, 1140-1144 (4th Cir. 1997); *United States* v. *Crowder*, 62 F.3d 782, 786-787 (6th Cir. 1995), cert. denied, 516 U.S. 1057 (1996); *United States* v. *McCurdy*, 40 F.3d 1111, 1118-1119 (10th Cir. 1994); *United States* v. *Wiley*, 997 F.2d 378, 382-383 (8th Cir.), cert. denied, 510 U.S. 1011 (1993); *United States* v. *Gonzalez-Sandoval*, 894 F.2d 1043, 1047-1048 (9th Cir. 1990); *United States* v. *Sangineto-Miranda*, 859 F.2d 1501, 1515-1519 (6th Cir. 1988); *United States* v. *Cherry*, 794 F.2d 201, 207-208 & n.6 (5th Cir. 1986), cert. denied, 479 U.S. 1056 (1987); see *Patterson* v. *United States*, 485 U.S. 922, 922 n.1 (1988) (White, J., dissenting from denial of certiorari). The fact that four circuits have addressed the issue since *Dickerson*—and have reached three different legal conclusions—underscores the recurring importance of the issue.

d. Finally, that the lower courts have not adjudicated whether respondent's statement was voluntary does not mean that the question presented by the

petition (Pet. I) is not "squarely presented" (Br. in Opp. 14). On the facts of this case, there can be no serious question that respondent's unwarned statement was voluntary. *Miller* v. *Fenton*, 474 U.S. 104 (1985) (voluntariness requires independent review). There was no evidence of police coercion that might have overborne respondent's will and thereby violated due process. *Id.* at 116. Respondent was under arrest, but he was not threatened with harm, offered improper inducements, or physically abused. He made the statements in question moments after being taken into custody and immediately after telling the police that he knew his rights.

Quite apart from the facts of this case that establish voluntariness, however, the court of appeals' holding clearly precludes admission of the fruits of respondent's statements even assuming they were entirely voluntary. The court's decision rests on the fact that warnings were not given; the court did not remand for the district court to resolve the issue of voluntariness in the first instance. And the court based its holding on the view that "*Dickerson* now concludes that an un-Mirandized statement, *even if voluntary*, is a Fifth Amendment violation." Pet. App. 19a (emphasis added). In view of that reasoning, it is clear that the court of appeals crafted a rule requiring the suppression of reliable physical evidence derived from an unwarned statement to vindicate *Miranda*—even if the statement was voluntary within the meaning of the Due Process Clause. That sweeping holding, which conflicts with the holdings of other courts of appeals, warrants this Court's review.

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For the forgoing reasons and those set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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Solicitor General

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